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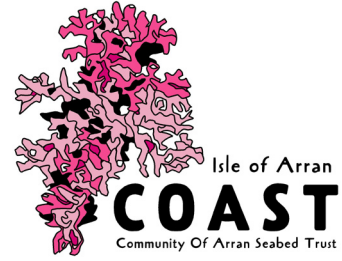
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The Enforcement of Fishing Restrictions in Marine Protected Areas

Saving our Seas through Law Policy Brief Series | Briefing No. 2



The Enforcement of Fishing Restrictions in Marine Protected Areas

Many marine protected areas (MPAs) are accompanied by management measures which seek to protect the conservation features of the area from the impacts of particular sorts of fishing gear. These measures are vital to achieving the conservation objectives of the MPAs, but if they are to be effective, they need to be adequately enforced. Yet, there are inherent challenges in enforcement of area-based fisheries measures. This policy brief considers the evidential hurdles in prosecuting fisheries offences committed in MPAs and it recommends a number of reforms in order to achieve a more robust legal framework to support the MPA network.

Policy Recommendations

- Ensure that all inshore MPAs are protected by Marine Conservation Orders (MCOs) which prohibit the deployment or use of fishing gear within relevant parts of the protected area and require that prohibited gear is effectively lashed and stowed whilst a vessel is within those parts of the MPA.
- Remove the requirement for corroboration for offences committed under MCOs.
- Harmonise sanctions that are available for offences committed under MCOs and the inshore fisheries legislation.
- Introduce, as a priority, requirements for the carriage of fully functioning remote electronic monitoring equipment for vessels wishing to fish within or in the vicinity of MPAs, including safeguards for situations in which the equipment may be faulty.
- Strengthen the points scheme for fishing vessel licences and masters in order to ensure that it provides an adequate disincentive to commit offences.
- Publish an annual report on the enforcement of fisheries and marine conservation.

The Importance of Fisheries Regulation and Enforcement

For centuries, fishing has played an important part in the life of coastal communities and it continues to do so today. However, unless carefully regulated, fishing has the potential to threaten the sustainability of fish stocks and also cause significant harm to other marine species and habitats. This means that the regulation of fishing is of particular concern around designated MPAs. Whilst the designation of a MPA in the Scottish marine area does not automatically introduce fisheries restrictions¹ and the Scottish Government has made clear that MPA designation precedes on the assumption that multi-use of the site will continue², a number of restrictions on fishing in MPAs have been introduced in order to avoid threats to protected features.

Whilst most fishing vessels comply with their legal obligations, there are a small minority within the sector which seek to exploit the advantages of fishing within prohibited areas or with prohibited gear in order to gain unfair economic advantage. Mere days after the establishment of the Lamlash Bay no-take zone in 2008, there was an incursion into the area by a scallop dredger³ and reports of infractions by vessels using a variety of gear have been made in the years since the establishment of the South Arran MPA.

Nor is this a problem limited to this area. In November 2018, Marine Scotland confirmed that it was investigating reports of alleged illegal scallop dredging in the Gairloch Protected Area.⁴

Whilst everyone would agree on the need for effective enforcement, the challenges of enforcing fisheries

restrictions within MPAs should not be underestimated. MPAs are spread around the Scottish coast and Marine Scotland Compliance has only limited enforcement assets.⁵ There are also other inherent challenges in taking successful enforcement action. It is these issues that will be addressed in this policy brief. The policy brief will use the fisheries restrictions within the South Arran MPA as a case study, but there are lessons that can be extended to many other Nature Conservation MPAs in Scottish waters.

The Scope of Fisheries Restrictions in MPAs

The designation of a MPA introduces immediate protection for the conservation features of the area from intentional or reckless actions which significantly hinder, or may significantly hinder, the achievement of the stated conservation objectives for the protected area.⁶ However, this prohibition is unlikely to apply to most fishing activity⁷ and it is for this reason that additional fisheries-related restrictions have been introduced. Fishing in most MPAs is regulated using powers under the inshore fisheries legislation, which allows Scottish Ministers to prohibit fishing within particular areas.⁸ Violation of these restrictions constitutes a criminal offence, but effective enforcement relies upon the ability to produce evidence that would satisfy a court. As the legislation prohibits 'fishing' in the protected area, it is not sufficient to show that a fishing vessel was simply in a MPA, but it must be proven that fishing was actually taking place. This is understandably difficult, particularly if the only witnesses are on shore.

In contrast, a small number of MPAs are

regulated under a MCO, which allows more flexibility in specifying prohibited activities. For example, the South Arran MCO eases the evidentiary burden to an extent by prohibiting the 'deployment' or 'use' of certain fishing gear within various parts of the protected area.⁹ The language of this prohibition is important as it means that it is then not necessary to demonstrate that actual fishing was taking place, but only that the gear was in the water. Moreover, the South Arran MCO requires that fishing gear is 'properly lashed and stowed in such a way that it may not be readily used'¹⁰ whilst in relevant parts of the protected area and such omission would also be an offence. It is recommended that this approach should be extended to all other MPAs in order to ensure consistency in protection across the board and to make it as easy as possible for enforcement authorities to take appropriate measures against alleged wrongdoing.

Evidential Challenges in Enforcing Fisheries Restrictions

Even for the South Arran MCO, certain challenges in enforcement remain, in part because of the stringency of evidential requirements laid down by criminal law. As the MCO establishes a criminal offence, the normal criminal standard of proof applies, namely proof beyond all reasonable doubt. This is appropriate, given the consequences for individuals concerned, who will face punishment and a criminal record if found guilty. Nor does the position change with the introduction of civil penalties for fisheries offences, which allows an individual to be issued with a fixed penalty notice (FPN) for an offence under any sea fisheries enactments.¹¹ Whilst the Scottish Government has stressed that the payment of a fixed penalty notice does not establish a criminal record – and is not 'an admission of guilt'¹² – it nevertheless recognis-

es that a FPN may only be issued where there would be a sufficiency of evidence to secure a criminal conviction, given that an individual can always refuse to pay a FPN and the case may therefore nevertheless end up in the criminal courts.¹³ It follows that there is still a high burden of proof even for issuing FPNs.

One way in which these evidential challenges has been addressed is through the incorporation of certain presumptions into the inshore fisheries legislation. Thus, recent amendments to the Inshore Fishing (Scotland) Act 1984 (and similar amendments to the Sea Fishing (Shell Fish) Act 1967) provide that a person commits an offence if:¹⁴

"(a) the person is found in, or in the immediate vicinity of, the area specified in an order under section 1 of this Act;

(b) the person is found there at, or about, a time at which the prohibition under the order applies;

(c) when so found, the person is in possession of such equipment, vehicle, apparatus or other gear or paraphernalia (including clothing) as may be used for the purpose of fishing in contravention of the order; and

(d) it is reasonable to infer from those facts (either by themselves or taken together with other circumstances) that the person intends to fish in contravention of the order."

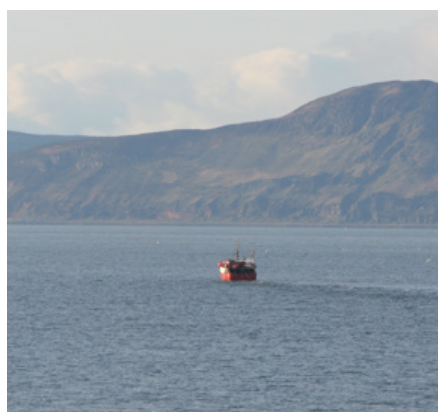
This provision was expressly introduced in order to make enforcement of fisheries offences easier¹⁵ and it means that it may not be necessary to prove the act of fishing within a protected area, but that presence of a vessel in the vicinity of the protected area with relevant fishing gear on board may suffice. The problem with this provision is that it is unclear when it is 'reasonable to infer' an intention to fish, particularly as it will normally be perfectly lawful to fish in the immediate vicinity of a protected area and it can always be claimed that the



Source: Coast

presence of a fishing vessel in an area is not connected with the commission of an offence. It is therefore no surprise that this provision has not been widely relied upon in criminal proceedings.¹⁶ It follows that alternative approaches to relieving the evidential burden must be found if fisheries law is to become more effective in ensuring that successful prosecutions are forthcoming.

One particular challenge in the context of Scots criminal law is the so-called corroboration rule, which requires that each essential fact relating to an offence must be corroborated by more than one witness.¹⁷ Corroboration has a long-standing history in Scotland and it has traditionally served a role in preventing miscarriages of justice, but the Carloway Review into this subject nevertheless recommended its abolition.¹⁸ These proposals have not yet been enacted¹⁹, but there are areas of law where the strict requirements for corroboration have already been removed, partly in recognition of the challenges of enforcement given the context of a particular criminal offence. A key example is section 19A of the Wildlife and Countryside Act 1981 which provides that 'in proceedings in Scotland for [listed offences], the accused may be convicted on the evidence of a single witness.' Such a provision was introduced as a result of the difficulties of providing evidence of these wildlife offences, which are often committed in remote places where few people are present. A similar argument could be made concerning fisheries offences, which are by definition committed offshore with few witnesses. Given these similarities, it can be argued that corroboration should also be removed for some fisheries offences, particularly



those committed in MPAs. However, such a change could only be made by way of amendments to the existing statutes and therefore it would need parliamentary time and approval.

An alternative way forward would be to make it easier to gather evidence that a vessel was within a MPA and it was acting in a way that indicated that it was using or deploying fishing gear. One proposal is to introduce a requirement for all vessels to carry a vessel monitoring system (VMS) or other remote electronic monitoring (REM) equipment when fishing in MPAs or their immediate vicinity, as this would provide enforcement officials with a means of monitoring the conduct of vessels.²⁰ VMS provides continuous reporting on the location and speed of a vessel, which allows enforcement officials to at least see when the movement of a vessel might indicate that it was carrying out fishing operations. VMS may provide an indication that illegal fishing may be taking place, but it falls short of providing proof thereof. In contrast, remote electronic monitoring equipment is a more sophisticated tool, combining VMS with digital video cameras and sensors to record when fishing gear is being deployed or hauled. Remote electronic monitoring systems were made mandatory for larger scallop dredgers operating in Scottish waters in June 2017²¹ and it has been suggested that the technology is now sufficiently developed that it can be employed to other sections of the fleet.²² Indeed the Future of Fisheries Management in Scotland National Discussion Paper moots the idea of introducing requirements for all vessels to carry remote electronic monitoring equipment in order to be allowed to operate not only in MPAs, but in buffer zones around them.²³ Similar restrictions already apply in other MPAs in UK waters, such as the Lyme Bay and Torbay Special Area of Conservation. Such proposals for Scottish MPAs

are welcome, but it will be important to ensure that appropriate technology is applied to all types of relevant fishing gear, both mobile and static, as well as to clarify the limits of the buffer zone. It is also important that appropriate safeguards are put in place to require that any electronic system is functioning at all times and to provide for default rules if the equipment was for some reason not functional.²⁴ It should also be made clear in the legislation that data from the electronic systems can be used as evidence in legal proceedings. One advantage of introducing such requirements in relation to MPAs is that they could be imposed through secondary legislation, for example through an amendment to the South Arran MCO, thus not requiring new primary legislation. It is therefore recommended that such measures are adopted as a matter of priority.

Penalties for Fisheries Offences

The importance of penalties for fisheries offences has been recognised in the Food and Agriculture Organisation's International Plan of Action to Combat Illegal, Unlawful and Unregulated (IUU) Fishing which calls for such penalties to be 'of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.'²⁵ The Inshore Fishing (Scotland) Act 1984 would seem to be lacking in this respect as a person who contravenes any order made under the Act shall be liable on summary conviction to a fine not exceeding £5000 or on conviction by indictment to a fine.²⁶ This maximum fine has not been increased since the enactment of the legislation, which has failed to keep up with other fisheries statutes, where the maximum penalties for offences have been significantly increased.²⁷ For those MPAs where measures have been adopted in the form of MCOs,

such as the South Arran MPA, there may be greater consequences for violations, however, as under the 2010 Act, a person who fails to comply with a MCO shall be liable on summary conviction to a fine not exceeding £50,000 or on conviction by indictment to a fine.²⁸ At the same time, an offence under a MCO would appear to be limited to the person committing the offence. In contrast,

criminal liability is broader under the 1984 Act, which provides that, where a fishing boat is used in the commission of an offence, the master, the owner and the charterer may also be held responsible.²⁹ Furthermore, the 1984 Act also provides for the forfeiture of any fish in respect of which the offence was committed³⁰, as well as the forfeiture of any net or other fishing gear used in the commission of the offence.³¹ These additional sanctions provide important disincentives to economic operators in this area, provided they are used in practice. Indeed, in some jurisdictions, confiscation of the vessel for serious offences is possible, although such a sanction must be proportionate to the offence committed.³² It is recommended that the Inshore Fisheries (Scotland) Act 1984 is amended to increase the maximum fine that is available and the nature conservation legislation is also amended in order to provide that prosecutions for offences committed by fishing vessels can be brought not only against the master, but also against the owner or charterer when appropriate and that the proceeds and instruments of crime can be confiscated as part of the penalty.

The commission of fisheries offences may also have repercussions on the right to fish. The Sea Fishing (Points for Masters of Fishing Boats) (Scotland) Regulations 2014 provide that persons convicted of committing a serious offence by a court will be allocated points and if the person accumulates at least 18 points, they are suspended from mastering a Scottish fishing vessel for a certain period of time. Furthermore, if a person accumulates 90 or more points, they are disqualified from mastering a Scottish fishing boat.³³ Points are also allocated against licences of fishing vessels committed on an offence, with the possibility of suspending or revoking the licence if a certain number of points are reached.³⁴ A maximum of 12 points can be allocated at any one time³⁵ and any points will be deleted if no further serious infringement is committed within the following three years.³⁶ Fishing within a closed area is in principle a serious infringement, although it will depend upon the 'gravity of the infringement [as] determined by the competent authority'.³⁷ This leaves some discretion to the enforcement authorities to impose penalties or not. Moreover, the Scottish legislation has adopted the position that points can only be assigned follow-



ing conviction by a court and therefore no points can be allocated if an offence is addressed by way of a FPN.³⁸ Thus, whilst this scheme is clearly a positive development in principle, there are significant shortcomings in its present form. In particular, it should be made clear that unlawful fishing within a MPA will always be considered a serious infringement in order to send a signal to the fishing sector that this sort of activity will not be tolerated. In other words, penalties should always be applied when an offence has been committed in an MPA. Moreover, points should be allocated regardless of whether a breach has been addressed through civil sanctions or criminal proceedings. This would be consistent with other aspects of the scheme which already allow points to be allocated to masters or added to licences where an administrative sanction has been applied in a third country.³⁹ Finally, the period of time over which penalties will accrue should be extended to create a more meaningful incentive. It is suggested that points should continue to be valid for at least 5 years.

Transparency

The National Discussion Paper on the

Future of Fisheries Management in Scotland recognises that 'fish are a public resource'⁴⁰ and it follows that they must be managed in a manner which benefits the public as a whole. A key aspect of good governance of public resources is transparency and this principle applies not only to management decision-making, but also enforcement. At the end of the day, it is not only necessary for public authorities to take enforcement action, but also to be seen to take enforcement action. Transparency concerning enforcement measures can serve a number of purposes. Firstly, providing information about enforcement actions and penalties imposed will send out a signal to the fishing industry that the full force of the law will be applied when any breaches are discovered. Secondly transparency will reassure those sectors of the fishing industry who do play by the rules that others are not getting away with violations, thereby reinforcing their decision to comply. Finally, reporting on regulatory and enforcement activity demonstrates effective stewardship to national political actors and the public.

The former Scottish Fisheries Protection Agency used to produce a report on fisheries enforcement, but this practice appears to have been abandoned.

Currently, Marine Scotland lists some information on its website concerning prosecutions, but this only provides a partial picture of enforcement activity as it only records successful prosecutions. It is recommended that Marine Scotland resurrect past practice by providing annual reports on its enforcement activities, including information on the number of investigations carried out, warnings given, FPNs issued, criminal proceedings instigated and the final results of proceedings, as well as penalties imposed. The report could also explain the nature of enforcement activity that is actually undertaken (e.g. days at sea by patrol vessels) and the key priorities for enforcement at a particular point in time. The existing Annual Wildlife Crime Report produced by the Scottish Government provides a model of how such an exercise could be approached. Such a report would not only be informational, but it would provide an opportunity to reflect on some of the challenges involved in policing Scotland's extensive marine areas and the consideration of realistic options for strengthening efforts in this regard. With this in mind, the report should be submitted to Parliament and it should be subject to appropriate scrutiny and review by the relevant parliamentary committees.

References

¹ See Policy Brief 4: Legal Tools for the Management of MPAs in Scotland.

² Marine Protected Areas in Scotland's Sea: Guidelines on the Selection and Development of the MPA Network (2017) para. 2.5(i).

³ See Kerri Whiteside, The Lamash Bay No-Take Zone: a community designation (Fauna and Flora International 2018) 68.

⁴ See BBC News, Probe into Alleged Scallop Dredging in Protected Area (14 November 2018), available at <https://www.bbc.co.uk/news/uk-scotland-highlands-islands-46207318>

⁵ There are apparently plans to introduce an additional inshore patrol vessel and increase aerial surveillance; see Scottish Parliament Rural Economy and Connectivity Committee, Wednesday 24 April 2019, 37.

⁶ Marine (Scotland) Act 2010, s.95.

⁷ See Marine (Scotland) Act 2010, s. 97(2).

⁸ See e.g. the Inshore Fishing (Prohibition of Fishing and Fishing Methods) (Scotland) Order 2015, which prohibits 'fishing for sea fish' in a number of different MPAs.

⁹ South Arran Marine Conservation Order 2015, article 4(2).

¹⁰ South Arran Marine Conservation Order 2015, article 4(3), read with articles 4(4), (6) and (8).

¹¹ See Aquaculture and Fisheries (Scotland) Act 2007, s. 25.

¹² Marine Scotland, Fixed Penalty Notices – Guidance for Industry (August 2015) 3.

¹³ See Marine Scotland, Fixed Penalty Notices – Guidance for Industry (August 2015) 3.

¹⁴ Inshore Fishing (Scotland) Act 1984, s. 4(1B).

¹⁵ See SPICe Briefing, Aquaculture and Fisheries (Scotland) Bill: as amended at Stage 2 (09 April 2013) 6.

¹⁶ The same can be said of the presumption that a person was fishing in contravention of the order

if they are found in the immediate vicinity of a protected area with relevant fishing gear, as it will almost always be possible to adduce evidence to raise an issue as to whether the person's presence was for the purpose of fishing in contravention of the order, thereby invalidating the presumption; see Inshore Fishing (Scotland) Act 1984, s. 4A.

¹⁷ The requirement of corroboration is discussed in detail in The Carloway Review: Report and Recommendations (17 November 2011), available at <https://www2.gov.scot/Resource/Doc/925/0122808.pdf>

¹⁸ Ibid., para. 7.2.55.

¹⁹ Subsequent consultation revealed substantial opposition to the proposals..

²⁰ See Marine Scotland, Future of Fisheries Management in Scotland National Discussion Paper (March 2019).

²¹ The Regulation of Scallop Fishing (Scotland) Order 2017.

²² WWF, Remote Electronic Monitoring (September 2017).

²³ Marine Scotland, Future of Fisheries Management in Scotland National Discussion Paper (March 2019) 16.

²⁴ Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy., Article 90(1).

²⁵ International Plan of Action on IUU Fishing (Food and Agriculture Organisation of the United Nations, 2001) para. 21.

²⁶ Inshore Fishing (Scotland) Act 1984, s. 4(2).

²⁷ Compare Sea Fish (Conservation) Act 1967, s. 11 (as amended), which has a maximum penalty of £50,000 for a summary conviction in Scotland and an unlimited maximum penalty for a summary conviction in England and Wales.

²⁸ Marine (Scotland) Act 2010, s. 94(2).

²⁹ 1984 Act, s. 4(1). Under s. 8, liability extends to a body corporate, although an offence can only

be committed 'with the consent or approval of any director or other officer of the body corporate.'

³⁰ Or an equivalent fine if the fish cannot be seized.

³¹ 1984 Act, s. 4(4). See also Aquaculture and Fisheries (Scotland) Act 2013, ss. 46-48.

³² See e.g. M/V Virginia G, ITLOS Reports 2014, para. 253.

³³ The Order further makes it an offence to master a vessel whilst suspended or disqualified.

³⁴ See Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, Article 92; Commission Regulation 404/2011, Articles 125-133.

³⁵ The Sea Fishing (Points for Masters of Fishing Boats) (Scotland) Regulations 2014, reg 9(1).

³⁶ See Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, Article 92(4); see also the Sea Fishing (Points for Masters of Fishing Boats) Regulations 2014, reg. 11. This does not apply if the master has been disqualified. Note that the three years is counted from the date of the offence, not the date of conviction, meaning that in reality the period of time which the points will stay on the register is significantly less than three years.

³⁷ Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy., Article 90(1).

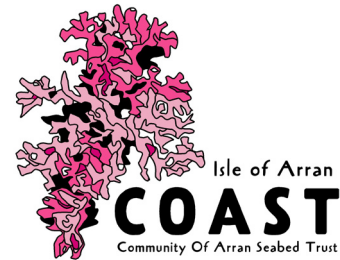
³⁸ See Marine Scotland, Guidance Note on EU Points System for Serious Infringements (May 2013) 2. See also The Sea Fishing (Points for Masters of Fishing Boats) (Scotland) Regulations 2014, reg 3(a).

³⁹ The Sea Fishing (Points for Masters of Fishing Boats) (Scotland) Regulations 2014, reg 3(c).

⁴⁰ Marine Scotland, Future of Fisheries Management in Scotland: National Discussion Paper (March 2019) 26.



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- Briefing 3: Using Marine Spatial Planning to Support Marine Protected Area Management
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